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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA,)	Case No. 23-CR-00269 JSW-3
)	
Plaintiff,)	UNITED STATES' POCKET BRIEF ON
)	DEFENDANT'S SUBPOENA OF
v.)	GOVERNMENT EXPERT IJAMES
)	
DEVON CHRISTOPHER WENGER,)	
)	
Defendant.)	
)	

The defendant has subpoenaed the government's expert witness, Steve Ijames, as an expert in their own case in chief. The government objects. The Court has requested that the parties provide a pocket brief on this issue. Dkt. 574.

Facts

The government retained Mr. Ijames as an expert beginning on August 4, 2023, to opine about the D.S. incident. *See* Declaration of Alexandra Shepard In Support of the Government's Objection to Defendant's Subpoena of Government Expert Ijames ¶ 2. The government provided an expert

1 disclosure signed by Mr. Ijames to the defense on or around October 29, 2024. *Id.* at ¶ 4.

2 In connection with the trials in this matter, however, the court substantially narrowed the scope
3 of expert testimony in this case during the first pretrial conference:

4 [The defendants' expert witnesses] may not testify whether they believe
5 the defendant's use of force was "reasonable," "justified," "not criminal,"
6 or "lawful." They may further not testify as to the defendant's mental state
7 or as to any legal standards.

8 Mr. Glen and Mr. Pfannenstiel may testify regarding general police
9 policies and professional standards of practice but shall not apply the
10 standards to the specific facts of this case. That admonition includes
11 hypotheticals. Counsel may not try to elicit testimony regarding
12 application of general standards to hypotheticals that trap the facts
13 presented by the parties. Counsel may, however, elicit testimony regarding
14 the facts in this case as to whether lesser force alternatives were available
15 in any injuries that they observed.

16 They may also testify as to the defendant's training or the Antioch Police
17 Department's policies.

18 *See* Transcript of February 10, 2025 pretrial conference, at 21-22 (attached as Exhibit A to the Shepard
19 Declaration).

20 In its written order, the Court further clarified: experts may not give improper legal conclusions,
21 testify whether they believe the defendants' use of force was "reasonable," "justified," "not criminal," or
22 "lawful," testify as to the defendants' mental states, or testify about legal standards. Dkt. 305 at 3.
23 Experts "may testify regarding general police policies and professional standards of practice, the
24 Defendants' training, and the Antioch Police Department's policies." *Id.*

25 In preparing for the current trial, the government decided not to call Mr. Ijames as an expert in its
26 case in chief. However, the government planned to call Mr. Ijames in its rebuttal case should the need
27 arise. Shepard Decl. at ¶ 5. As a courtesy, because the defense included Mr. Ijames' name in their
28 opening slides, the government notified defense counsel on the afternoon of Friday, September 5, that it
29 didn't intend to call Mr. Ijames in its case in chief. *Id.* at ¶ 6. Before 7 a.m. the next day, the defense
30 subpoenaed Mr. Ijames to testify in their case in chief. *Id.* at ¶ 7. Mr. Ijames notified the government
31 that the defense advised him that they would pay all of his fees and expenses to testify.¹ *Id.* at ¶ 8.

¹ Mr. Ijames does not take any compensation for expert testimony in criminal cases. Shepard

Brief argument was heard by the Court on September 8, 2025, during which the defense did not appear to suggest in open court that they intended to use him as hostile witness.

Argument

The government has thus far not found a case in the criminal context in which an expert noticed by the government or defense was ultimately called not by that party but rather by the opposing party. The government has identified a number of cases in the civil context, but those cases seem to suggest an array of possible standards a court could use to determine the appropriate outcome. See *Altaa Invs., LLC v. Prod. Cap., LLC*, No. 2:22-CV-00498-FWS-MAA, 2023 WL 4157365, at *10 (C.D. Cal. June 7, 2023) (collecting cases). These standards include application of Rule 403; committing the decision to the “sound discretion of the district court”; and “exceptional circumstances.” See *id.* (allowing expert where opposing party had shown “there is no expert regarding film finance who can aid the finder of fact on that particular topic). See also *House v. Combined Ins. Co. of Am.*, 168 F.R.D. 236, 246 (N.D. Iowa 1996) (summarizing standards and determining “discretionary” standard to be appropriate; allowing expert psychiatrist where psychiatrist had personally examined plaintiff).

Multiple courts, however, have expounded upon the extreme prejudice that jurors may assess upon a party if they discover that party has declined to call an expert. See, e.g., *Peterson v. Willie*, 81 F.3d 1033, 1037 (11th Cir. 1996) (“Jurors unfamiliar with the role of counsel in adversary proceedings might well assume that plaintiff’s counsel had suppressed evidence which he had an obligation to offer. Such a reaction could destroy counsel’s credibility in the eyes of the jury.”); *Rubel v. Eli Lilly and Company*, 160 F.R.D. 458, 460 (S.D.N.Y.1995) (describing such a revelation as “explosive”). The government notes that although Mr. Ijames can be compelled to testify, he cannot be compelled to meet with defense counsel in advance of his testimony. That is a decision that must be left to Mr. Ijames alone.

Based on its review of the case law, the government believes that whether or not Mr. Ijames is permitted to testify in the defendant’s case as an expert witness is within the Court’s discretion. However, if the Court permits Mr. Ijames to testify in the defendant’s case in chief, his testimony should

Decl. ¶ 2.

1 be limited to the scope of his expert disclosure. Anything else is a previously-undisclosed opinion
2 which the Court has already prohibited in connection with two defense experts in this case, James
3 Colley and David DuBay. *See* Dkt. 540. Further, the government believes that the Court should
4 prohibit any testimony on Mr. Ijames retention by the government as an expert witness in this case.
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7 DATED: September 9, 2025

Respectfully submitted,

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10 /s/
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